

Hearing:  
June 25, 2003

**THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT  
OF THE TTAB**

Mailed:  
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Paper No. 21  
Bucher

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re Symbio Herborn Group GmbH & Co.

Serial No. 75/583,411

William H. Holt for Symbio Herborn Group GmbH & Co.

Carol A. Spils, Trademark Examining Attorney, Law Office  
105 (Tom Howell, Managing Attorney).

Before Hanak, Bucher and Holtzman, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Symbio Herborn Group GmbH & Co. seeks registration on  
the Principal Register for the mark shown below:



for "pharmaceutical and veterinary products, namely,  
biological cultures and media for use in the  
production of nutritional additives for medical, for  
veterinary and for sanitary purposes and for the  
care of health, such nutritional additives

consisting of or containing bacterial and/or enzyme preparations; vitamin preparations, roughage and mineral-food supplements; namely, nutritional supplements, vitamins, mineral supplements and nutritional additives for animal and human food; preparations of trace elements for human and animal use, namely, nutritional supplements and/or trace elements for medical, for veterinary, for sanitary purposes and for the care of the health,"<sup>1</sup>

in International Class 5.

This case is now before the Board on appeal from the final refusal to register based upon Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d). The Trademark Examining Attorney has held that applicant's mark, when used in connection with the identified goods, so resembles the mark SYMBIO registered for "Drug [preparation in capsule form] product for veterinary use to combat infection," also in International Class 5,<sup>2</sup> as to be likely to cause confusion, to cause mistake or to deceive.

Applicant and the Trademark Examining Attorney have fully briefed this appeal and both appeared before the Board at the oral hearing requested by applicant.

We affirm the refusal to register.

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<sup>1</sup> Application Serial No. 75/583,411 was filed on November 5, 1998, based upon German Registration No. 1,128,662, in accordance with §44(e) of the Trademark Act. Applicant has disclaimed the term LACT apart from the mark as shown.

<sup>2</sup> Registration No. 756,724, issued on the Principal Register on September 17, 1963; renewed.

Our determination under Section 2(d) is based upon an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

As to the differences in the two marks, applicant argues as follows:

"... [I]t is clear that the differences between applicant's mark SYMBIO LACT (and Leaf Design) and the cited mark SYMBIO, *per se*, are distinct from each other in all three of the trilogy of sound, appearance and meaning..."

(applicant's appeal brief, p. 5).

By contrast, the Trademark Examining Attorney argues as follows:

"Applicant's mark simply adds the term LACT to the dominant term SYMBIO in the registrant's mark. LACT is descriptive and disclaimed. The mere addition of a term to a registered term is not sufficient to overcome a likelihood of confusion under Section 2(d)..."

(Trademark Examining Attorney's appeal brief, p. 5).

We agree with the position of the Trademark Examining Attorney that these marks are confusingly similar. Clearly, marks must be considered in their entireties, including any descriptive matter. Nonetheless, our principal reviewing court has indicated that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, according to the court, "that a particular feature is descriptive ... with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark ...." *Id.* In the instant case, SYMBIO is registrant's entire mark, and applicant has simply added a descriptive term to this matter - placing the term LACT directly below the word SYMBIO. Similarly, while the letter "Y" in applicant's SYMBIO with its elongated tail and leaf design does create a somewhat different appearance, we find that it is not significant enough to obviate the confusing similarity of these two marks.

We turn then to the similarity in the nature of the goods as described in the application and cited registration. The goods of the cited registration are antibiotic drugs used to kill bacteria in animals. The goods listed in the involved application comprise a much broader range of health and medicinal products, but include veterinary products designed to improve the nutrition and health of animals. Unlike registrant's antibiotics, these therapeutic products are described as containing beneficial bacteria.

Of course, it is not necessary that the respective goods be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such, that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods. See In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); In re Melville Corp., 18 USPQ2d

1386 (TTAB 1991); In re International Telephone & Telegraph Corp., 197 USPQ2d 910 (TTAB 1978).

Accordingly, we find that these respective goods are not competitive or overlapping. In fact, while registrant's goods are designed to combat harmful bacteria, applicant's goods rely upon helpful bacteria. Nonetheless, we find that both include pharmaceutical preparations intended for use with animals. As such, these related goods could well be encountered by one caring for animals in such a way that it might give rise, because of the similarity of these marks, to a mistaken belief that there is a connection between the sources of these respective goods.

Turning to the du Pont factors dealing with the similarity or dissimilarity of established, likely-to-continue trade channels as well as the conditions under which and buyers to whom sales are made, we must presume that applicant's goods and registrant's goods will move through all of the normal channels of trade to all of the usual purchasers for goods of the types identified. See Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815, (Fed. Cir. 1987). There is no limitation inherent in these goods, so we must presume that the purchasers of applicant's and of registrant's goods

include ordinary consumers. Hence, in looking to these two related du Pont factors, we conclude that the channels of trade and classes of purchasers will be the same.

As to the du Pont factor that focuses on the number and nature of similar marks in use on similar goods, applicant argues "... that the mark SYMBIO is a weak mark in that a considerable number of Registrations have been granted for the identical mark and for variations of the word .... Thus it appears that marks comprised of SYMBIO, plus a distinguishing suffix, are appropriate for registration." (Applicant's brief, p. 4).

Although applicant has attached to its brief a simple listing of trademark registrations and pending applications containing SYMBIO- formative marks, this does not provide any information about the goods or services listed in these applications and registrations. Certainly, many of these marks on their face do not separate out the word SYMBIO from other letters or words in the composite as does applicant's special form drawing. Moreover, even if we had much more detail on the goods or services involved in the subsisting registrations, these registrations are not evidence that the marks shown therein are in commercial use or that the public is familiar with them. Finally, to the extent several other SYMBIO-formative marks owned by

applicant have been handled differently than the instant application, they may well demonstrate that among third-party marks on the federal trademark register, SYMBIO-marks are relatively weak when applied to pharmaceutical preparations directed to humans but not weak as to pharmaceutical products within the ordinary channels of trade directed to the veterinary marketplace. In any case, while the SYMBIO prefix may well have a suggestive connotation in the pharmaceutical field, on this record, we cannot agree with applicant that SYMBIO has been shown to be a weak mark subject to a narrow scope of protection for veterinary products.

In conclusion, we find that the respective goods are related and move in the same channels of trade to the same ordinary consumers, that the two marks are confusingly similar, and that SYMBIO is not a weak mark for the goods identified in the cited registration.

*Decision:* The refusal to register is hereby affirmed.